JAYARAMAN & ORS. v. PUBLIC PROSECUTOR

[A.C.J. (Syed Othman F.J.) May 29, 1981]
[Selangor – Criminal Appeal No. 1 of 1980]

Criminal Law and Procedure – Culpable homicide not amounting to murder – Appeal – Findings of facts – What amounts to arrest – Statements made by accused persons – Whether admissible – Earlier discharge of accused not amounting to acquittal – Whether plea of autrefois acquit could stand – Whether defence entitled to statements of witnesses – Circumstantial evidence – Satisfaction beyond all reasonable doubt – Medical evidence – Sentence – Criminal Procedure Code, s.113.

Evidence – Circumstantial evidence – Satisfaction beyond reasonable doubt.

This was an appeal against the decision of the learned President, Sessions Court, Klang, convicting the appellants for causing the death of the four deceased persons under section 304 read in conjunction with section 34 of the Penal Code. The appeal raised a number of questions of facts and law.

Held: (1) the appeal against the grounds of judgment in this case dealt too much on findings of fact rather than on substantial points of law. The appellate court has not had the advantage of seeing or hearing the witness and unless it could be shown that the trial court had misused its advantage, it was not for the appellate court to reverse the trial court's findings. In this case not one of the numerous points alleging misdirection of facts taken alone or all those taken together could justify the appellate court to interfere with the findings of the trial court;

(2) as the earlier discharge of the accused did not amount to an acquittal the plea of *autrefois acquit* could not stand;

(3) in the circumstances of this case the prosecution was under no obligation to supply statements of their witnesses to the defence. The defence is only entitled to the police statement when a prosecution witness is to be impeached;

(4) whether or not there is an arrest is a question of fact to be determined by the trial court and in this case the learned President was right in holding that the Police Corporal was not making an arrest when he told the appellants not to leave the temple compound;

(5) the statements made by the appellants to the Police Corporal when he arrived at the scene were not admissible in evidence but the statements made to the Police Inspector were admissible as they were made to him before arrest;

(6) there was no reason to disturb the findings of the trial court that Inspector Govindan who recorded cautioned statements from the appellants, was competent in Tamil, that the words he used in the caution statements have the same effect as required by the Criminal Procedure Code and that the statements were recorded within the time stated in them. The cautioned statements were therefore rightly held to be admissible in evidence;

(7) in dealing with a case which relies on circumstantial evidence it is sufficient if the court makes a finding that in considering all the evidence it is satisfied beyond reasonable doubt that the accused is guilty of the offence. In any case the learned President in his judgment came to the "inescapable conclusion" that the appellants were expert fighters, which is the same as "irresistible conclusion";

(8) on the evidence the trial court formed the inescapable conclusion that the appellants were expert fighters. Considering the number of persons dead, four, and one badly injured on the grounds of the temple and the weapons used by the appellants, the only conclusion that can be drawn is that all the appellants must have participated in the fight;

(9) in this case the deceased persons died of very severe injuries and from the evidence the learned President was entitled to form his opinion as to the nature of the weapons which had been used to inflict the injuries. It did not take an expert to determine whether the injuries could or could not cause the death or what weapon was used to cause the injuries. These are questions of fact and the trial court was in as good a position as the expert to determine the questions;

(10) from the injuries suffered only by two of the appellants the only conclusion that can be drawn is that the deceased persons offered hardly any resistance when they were attacked. With the instruments they had and having been surrounded by the appellants they were in no position to attack. The appellants had superior weapons and showed no mercy towards the deceased persons. All the evidence pointed to the conclusion that the appellants were all acting in concert and had the intention to kill from the outset. On the evidence the defence of self defence could not have been considered;

(11) the finding of guilt against all the appellants must therefore be upheld. Although the sentences imposed were on the lenient side, they would not, in the special circumstances of the case, be disturbed.

Editorial Note: On Appeal, the above decision was affirmed by Federal Court on June 10, 1982.

Cases referred to:–

(1) *Watt or Thomas* v. *Thomas* [1947] A.C. 484.
(2) *Alderson* v. *Booth* [1969] 2 Q.B. 216; 53 Cr.App. R. 301.
(3) *R.* v. *Inwood* [1973] 1 W.L.R. 647.
(4) *Lim Foo Yong* v. *Public Prosecutor* [1976] 2 M.L.J. 259.
(5) *Kartar Singh & Anor* v. *Rex* [1952] M.L.J. 85.
(6) *Mc Greevy* v. *Director of Public Prosecutions* [1973] 1 W.L.R. 276, 279; [1973] 1 All E.R. 503.
(7) *Reg.* v. *Onufrejczyk* [1955] 1 Q.B. 388.
(8) *Rex* v. *Horry* [1952] N.Z.L.R. 111.

CRIMINAL APPEAL.

D.P. Vijandran (*Chandran G. Nair* with him) for the appellants.

Muhammad Shafee bin Abdullah (Deputy Public Prosecutor) for the respondent.

Syed Othman F.J.: This appeal is against the decision of the learned President, Sessions Court at Kelang. On January 2, 1980 he convicted the appellants of 4 charges under section 304 read in conjunction with section 34 of the Penal Code for

causing the deaths of (1) Mohd. Amin bin Doyak, (2) Mispan bin Tunut, (3) Suppian bin Ali, and (4) Ahmad Nasiruddin bin Bunyamin. On the 1st charge, the 4th and 5th appellants were sentenced to 18 months' imprisonment and the others 2 years each. On the 2nd, 3rd and 4th charges, the 4th and 5th appellants received 2 years 6 months each on each.

The sentences were to run concurrently.

The Public Prosecutor also appeals against sentences for inadequacy.

The appellants' petition of appeal runs to 57 pages containing 95 main grounds of appeal including 5 relating to sentence. Para 19 lists out 117 particulars alleging findings which are said to be against the weight of evidence or against the drawing of adverse inferences, or which are said to be based on personal conjecture and not on facts proved before the court or the result of illogical arguments. Ground 20 lists out 17 particulars alleging failure to make inferences favourable to the appellants. There are other grounds which list out particulars. The length may be understandable as the grounds of judgment runs to 243 pages, typewritten double-spaced, and the Notes of Evidence runs to 654 pages.

I wish to say from the outset that it must be said that the appeal against the grounds of judgment dwell too much on findings of facts rather than on substantial points of law. It must be made clear that the appellate court has not had the advantage of seeing or hearing the witnesses and unless it can be shown that the trial court has misused its advantage, it is not for the appellate judge to reverse the trial court's findings. In this respect I need only refer to the judgment of Lord Thankerton in *Watt or Thomas* v. *Thomas*[1] in which he said at p.487:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;"

I would not therefore deal with the numerous points alleging misdirection of facts which form the bulk of the grounds of appeal. It is sufficient to say that not one of those taken alone or all those taken together would justify me to interfere with the findings of the trial court. Nonetheless I shall go through the salient points of facts and deal with points of law which merit consideration.

The case for the prosecution may briefly be put as follows: The deceased persons and Zubir, the survivor of the incident, were Muslim Malays who apparently had extreme views on idolatry. Between 10.30 p.m. and 11.00 p.m. on 18.8.1978 they left Kajang in a motor car intending to go to Tanjong Malim. On the way before reaching Kerling they destroyed idols at three places. They arrived at the gate of the Sri Subramaniam temple in Kerling at about 2.30 a.m. on 19.8.1978. Mohd. Amin bin Doyak (1st deceased), Nasiruddin bin Bunyamin (4th deceased) and Zubir came out of the car and went to the gate of the temple ground. The gate was padlocked. Mohd. Amin flashed a torchlight to the inner part of the temple and the surrounding areas and did not see anyone. In fact that night the place was guarded by 10 persons including the 8 appellants. The police had alerted the temple that some persons had been destroying idols and it should be guarded. According to Zubir, it was understood amongst them that if there were persons in the temple they would leave the place to avoid confrontation. They saw no movement. Mohd. Amin climbed over the gate. With a hammer he forced open the padlock. The three then walked towards the small temple, the Saneswaran temple, which is an open structure situated in front but to the side of the main Sri Subramaniam temple. Mispan (2nd deceased) and Suppian (3rd deceased) were in the car. Suppian was at the driving wheel. The car was reversed through the open gate into the compound of the temple. The three who entered the Saneswaran temple had between them an iron pipe, a hammer and a torchlight. They knocked down the 9 idols in the Saneswaran temple by using the iron pipe or pushing them down with their hands, crying out "Shaitan" and "Ibilis". Zubir was the last person to use the iron pipe to smash the stone idols. He was also the last to leave. As he was turning to the parked car he felt a blow over his head and fell on his back. He saw 3 of the attackers holding long weapons, raising them as if to hit him again. He got up and ran towards the car. He heard people saying something like "Datang kasi pechah, kasi pukul, kasi mati ...". As he continued running to the car, he saw his two other friends outside the car. They could only be Mohd. Amin and Nasiruddin. When they came near the car facing the main temple, Zubir heard footsteps behind him. He saw several persons facing them armed with long weapons and in a threatening manner. Zubir was unarmed. He lost the iron pipe

when he was hit on the head. He could not remember if his two friends had anything in their hands. Anyway, on the evidence, the only instruments they had between them at that time could only be a torch-light and a hammer. The three tried to frighten the persons coming towards them by shouting and raising their hands. One of them shouted "masuk kereta". Zubir got into the rear of the car and sat on the floor with his head behind the front passenger seat. The door of the car was closed. Immediately after he had entered, the other door opened and Suppian entered the car. Then someone came to the driver's seat. Zubir heard the engine of the car being started, the driver being dragged out of the car and the engine of the car stop. He saw Suppian being struck with the back of a spade and slumping into the car. Suppian received 2 or more blows on the face and on his body. Someone else then came into the driver's seat and started the engine of the car. Then Zubir heard that this driver too being dragged out of the car and the engine of the car again stop. Of the 5 intruders, only 3, Suppian, Amin and Zubir, could drive a car. Zubir saw one person being dragged out and someone coming with a shovel. He also saw Suppian receiving two more blows on his face and on his body and being poked with a long weapon. Zubir too was poked with a wooden pole or iron rod. Afterwards he saw Suppian's face covered with blood. According to Zubir, Suppian must have got all the injuries while in the car. The car was also hit from all sides, particularly at the back. It was badly damaged. Zubir played dead by making very little movement. He also heard words being said "Babi, Datang kasi pechah ... Aha ... Kasi mati". Later things began to subside and he heard the police arriving.

From Zubir's account, the attackers, who could only be the appellants, must have surrounded the intruders. According to Corporal Abdul Ghani (PW 3), Letchumanan, later followed by Palanisamy, came to the Police Station, Kerling, at about 3.05 a.m. on 19.8.78 and informed him that 5 males had come to attack the temple, that there was a fight between them and the temple guards, and that the people were surrounded. These statements were first information and are therefore admissible. Corporal Abdul Ghani went to the temple with Letchumanan and Palanisamy. There he saw the 8 appellants and the priest of the temple, Simbulingam. He told them not to leave the place. He also found 5 bodies, 2 in the back seat of the car, 2 on the left side of the road of the temple and one on the right side of the car facing the main road along the temple. The bodies were later removed to the hospital by other police personnel.

Assistant Superintendent of Police (ASP) Jamaluddin (PW 2) arrived at the temple at 3.35 a.m. He questioned the appellants. At first he said everyone replied that they had participated in the fight, but later he said he merely questioned them as a group. In any case, apparently none of them said that they had not been involved. They also informed him that they were defending the temple. One of the appellants showed the weapons they had used in the fight. At the scene he saw a car badly damaged and one person already dead on the ground. This was Mohd Amin. Ahmad Nasiruddin died on the way to the hospital. The two others died in hospital early that morning. He saw a parang at the back of the car. No other parang was recovered at the scene when he was there.

Inspector Govindan (PW 14) recorded the cautioned statements on the same day from Jayaraman (1st appellant), Subramaniam (4th appellant), Krishna (3rd appellant), Sappany (5th appellant), Arumugam (7th appellant) and Veerapan (6th appellant) and on 22.8.1978 from Tangiah (8th appellant).

It is necessary to show here briefly the injuries suffered by the four deceased as they are highly relevant to determine the intention to kill. The postmortem evidence as recorded from Dr. Kernail Singh (PW 1) may be put as follows:

1st deceased, Mohd. Amin bin Doyak, 28 years old, had these main injuries: (a) a deep laceration starting from right carotid region and extending to the other side of the neck measuring 7" long, 2" wide and 4" deep; the right ear lobe was cut through completely; the right side of the occipital bone was cut through completely; the neck was half severed and the brain would have been penetrated; (b) 4" long, 2" wide and 1" deep laceration over the face of the right occipital bone extending from the right ear; (c) 2" long, 1" wide and half an inch deep laceration over the right parotid region between the ear and the cheek.

The deceased had 3 injuries on the arms which the doctor described as defensive injuries.

The injuries were caused by a sharp weapon.

The cause of death was 3 fractures of the skull, each by itself could have caused death. Death could also have been caused by multiple lacerations and consequent loss of blood.

2nd deceased, Mispan bin Tunut, 26 years old, had 4 fatal injuries: (a) a gaping wound – laceration starting 4" below the mouth on the left jaw, 8" long, 2" wide and 3" deep and left mandible, lower jaw, was fractured; (b) a deep cut injury 1" above the first injury measuring 8" long, 2" wide and 2" deep. This injury was parallel to injury (a); (c) a deep cut injury starting above injury (b) and extending to the left temporal bone cutting through the maxillary bone with fracture of left temporal bone and there was brain matter fungating through the wound; (d) laceration 8" long extending from the lateral angle of the left eye to the occipital bone. The occipital bone and temporal bones were fractured and brain matter was fungating through the wound. Each of the 4 injuries could have been caused by a sharp weapon.

The cause of death was lacerations with fractured skull leading to oligamic shock and intracranial haemorrhage.

3rd deceased, Suppian bin Ali, 27 years old, had the following injuries on the face disfiguring it: (a) a 4" cut laceration over left front region, the forehead; (b) an 8" clean cut laceration from above the middle of the left eye-brow extending to the left maxila; root of the nose, both eyes and eye balls were avulsed; they were torn and taken out. There was fracture of the frontal bone, left maxila and left zygomatic bone and all nasal bones; (c) a 6" long, 4" wide and 1" deep laceration starting from the middle of the skull and forming a semi lunar shape cut injury over the left aparietal bone which was chipped. There was possible brain damage from the injury; (d) another similar cut just above injury (a).

There is no need to mention other injuries.

The cause of death was multiple lacerations with fractured skull leading to oligamic shock and cerebral haemorrhage and intracranial haemorrhage. Each of the above injuries by itself could have caused death.

4th deceased, Ahmad Nasiruddin bin Bunyamin, 20 years old, had this main injury – a deep cut from the whole of the right ear to the opposite side of the neck measuring 8" long, 3" wide and 4" deep. Both mastoid processes (bone holding projection behind the ear) were cut; half of the neck was severed. This injury, inflicted by a sharp weapon, by itself could have caused death. There were 7 other injuries, 3 of which the doctor described as defensive injuries as they were on the hands and fingers.

Looking at the injuries (more than 30 in all, according to the learned President) being concentrated on the face of each of the deceased persons, and on the evidence of Zubir that long poles were used, the injuries could only have been inflicted by persons who were expert in using instruments for cutting which have long handles, e.g. oil palm nut cutter. The learned President found that the instrument could be a spade, an instrument attached at the end of a handle.

The presence of the appellants in the temple compound on the arrival of the police which was almost immediately after the report, the 5 fallen intruders lying in the compound of the temple and the weapons found at the scene showed consistency in the evidence of Zubir. From all these circumstances there can be no doubt that all the appellants had been involved in the fight.

The first point raised in the appeal is that the trial was bad in that it was a trial over the same charges and the court should have recorded an *autrefois acquit*, because the appellants had faced similar charges which had been withdrawn before this trial. From the record of the first trial, after many adjournments, the hearing started on 12.2.1979. Defence counsel at first argued that he was entitled to the statements made to the police under section 112 of the Criminal Procedure Code (CPC) and the Court rightly ruled that he was not entitled to them. The first witness called was the medical officer. Towards the end of the evidence of the medical officer, the Deputy Public Prosecutor felt that the trial was bad, as he was of the view that under section 164 of CPC only three charges, not four as in the trial, could be preferred against an accused person for similar offences and so informed the court. There seemed to be a consensus of opinion. The prosecution applied for discharge of the appellants not amounting to acquittal. The defence counsel agreed to this. The learned President discharged the 8 appellants not amounting to an acquittal.

The hearing clearly did not come to a full or complete trial. There was no adjudication which resulted in an acquittal or conviction on any of the charges. Since the application was made at the beginning of the trial and before the conclusion of the prosecution's case and with the consent of the court, the court was perfectly

within its power to make the order of a discharge not amounting to an acquittal. See section 254 of CPC. Apart from that, the defence also consented to a fresh trial. As the discharge did not amount to an acquittal, the plea of *autrefois acquit* cannot stand. Section 302 (v) of CPC clearly says that the discharge of the accused is not an acquittal for the purpose of this section, which relates to previous acquittals or convictions.

Defence counsel then argued that he was entitled to the statements recorded by the police of witnesses and in the hands of the prosecution, if the prosecution did not intend to call them as prosecution witnesses, and the learned President of Sessions Court was wrong in overruling his application.

In my view, in the circumstances, the prosecution was under no obligation to supply statements of their witnesses to the defence. The defence is only entitled to the police statement when a prosecution witness is to be impeached. When the defence makes an application for impeachment, the Court would examine the witness's statement to the police, and, if the court thinks it expedient in the interest of justice, would direct a copy of the witness's statement to be supplied to the defence. Normally, such direction is made if the court finds that the witness had given evidence which is materially different from his police statement.

It is then contended for the appellants that there was an arrest when Corporal Abdul Ghani (PW 3) on arriving at the scene of the incident told all persons present not to leave the compound of the temple but to wait there. The learned President held a trial within a trial on the issue. On being questioned by the defence counsel, the Corporal said that he would have arrested the appellants if they had tried to leave the place. It was argued that this amounted to an arrest. The learned President held otherwise.

Archbold Criminal Pleading, Evidence & Practice, 14th edn., p.1339 contains and discusses a number of authorities on arrest. In general an arrest is constituted by a physical seizure or touching of the accused person's body, with a view to his detention. In *Alderson* v. *Booth*[2], however, it was said that there is no longer any need for an actual seizing or touching to constitute an arrest. There may be an arrest by mere words by saying "I arrest you" without any touching, provided that the accused submits and goes with the officer. In *R.*v. *Inwood*[3] it was held "there is no magic formula, only the obligation to make it plain to the suspect by what is said and done that he is no longer a freeman. Whether that obligation has been discharged is a question of fact, not of law and it must be left to the jury to decide whether a person has been arrested or not at least when there is a real dispute as to the question whether the defendant understood that he was being arrested".

On the above authorities, whether or not there is an arrest is a question of fact to be determined by the trial court. I am inclined to agree with the learned President that the Corporal was not making an arrest when he told the appellants not to leave the temple compound. The fact that the Corporal said that he would have made the arrest if the appellants had tried to leave the place does not mean that an arrest in fact been made. We are not concerned with his intentions but with his actions. At no time did he make it plain to the appellants that they were no longer free men. I am inclined to believe, in the circumstances of this case, that the appellants themselves elected to remain to help the police in the investigations. By his request, the Corporal was merely seeking their co-operation to remain in the temple ground until the arrival of the investigating officer. It seems to me that he did not want to do anything until the arrival of the investigating officer and until he had received his directions; he was uncertain whether or not to make an arrest considering that the intruders had invaded the temple; and he must also have realised that the matter was sensitive as it affected communal and religious issues. Under these circumstances, the appellants cannot be said to have been in police custody.

However, I agree that any statement made by any of the appellants to the Corporal when he arrived at the scene is not admissible in evidence, i.e. the statement by Arumugam (7th appellant) to the Corporal who asked the appellants whether they participated in the fight (p. 197 of Vol. A of record). They all said "yes" and added "Fasal dia rusak kita punya sembahyang tempat". (Because they destroyed our place of prayer). This statement is not admissible having regard to section 113 of CPC which specifically refers to a statement to a police officer of or above the rank of Inspector. However, the same statements were made to ASP Jamaluddin (PW 2) on his arrival.

But it is still contended the statements to the ASP are nonetheless inadmissible, because the caution under section 113, proviso (a) (ii) of CPC

was not administered to them. In my view this proviso applies to a statement made by the person after his arrest. Here, no arrest had yet been made. The statements, I am of the view, fall under proviso (a) (i) section 113 of CPC which, to put it briefly, lays down in effect that no such statement (made before arrest) shall be admissible or used as aforesaid if the making of the statement appears to the court to have been caused by any inducement, threat or promise etc.

Section 113 of CPC reads:

"113.(1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing made at any time whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of Inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:

Provided that

(a) no such statement shall be admissible or used as aforesaid –

(i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person in authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or

(ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:

'It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'; and

(b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

(2) Notwithstanding anything to the contrary contained in any written law a person accused of an offence to which sub-section (1) applies shall not be bound to answer any questions relating to the case after any such caution as aforesaid has been administered to him."

To put it briefly proviso (a) (ii) of section 113 (1) of CPC clearly relates to a statement made by the person after his arrest in which case the prescribed caution must be administered. Proviso (a) (i) is alternate to proviso (a) (ii). On the construction of provisos and their sequence, proviso (a) (i) should be construed as rendering admissible a statement made before arrest if it appears to the court that in making it there was no inducement etc. The important point to note is that it must be made before a police officer of or above the rank of Inspector. The trial court was satisfied, and I agree, that the statements to ASP Jamaluddin (PW 2) were made freely and in effect fell under proviso (a) (i) and therefore admissible.

At the trial when the statements were admitted, counsel was present. From the record he did not appear to have challenged their admissibility on the grounds that are now put forth. At pp. 25-6, Vol. A of record, defence counsel himself said: "We do not in any way know what the statements are going to be. I would object to this statement on the ground that though they were given freely without inducement, etc., we have no evidence on that score. We do not know whether they were in a state of arrest or not."

It is also argued on behalf of the appellants that the procedure adopted in the trial within trial on the cautioned statements was not proper, and that Inspector Govindan, a Malayalee, was not competent to record them from the appellants who are Tamils. Inspector Govindan (PW 14) recorded six cautioned statements the same morning. Defence counsel applied to the court for one trial in respect of the cautioned statements so that the Inspector would have no opportunity of correcting or modifying himself in subsequent trials if he made some slips in the earlier trials. The learned President ruled that there should be separate trials. In the circumstances of this case, I agree with him. Each cautioned statement contained matters or situations which would be unrelated to another cautioned statement. To have a joint trial in the circumstances of this case would have caused confusion, as there was a real possibility of the situation in which one cautioned statement was made might have been different from another and might require a different treatment by the court.

In the trial within trial on the cautioned statements, Inspector Govindan gave evidence that although he is a Malayalee he can speak

Tamil; he learned Tamil from friends who were Tamil teachers. In the recorded statement the usual words of warning appear in English: "It is my duty to warn you that you are not obliged to say anything or answer any question, but anything you say, whether in answer to a question or not may be given in evidence". The defence showed that the rendering of the caution by the Inspector was in Tamil, which when translated into English reads: "There is no compulsion here that you should say anything or answer questions, but whatever you say here, whether you answer questions or not, it will be given as evidence at the time of investigation". Inspector Govindan was tested by one Professor of Indian Studies in the University of Malaya. The learned President was satisfied that Inspector Govindan could speak Tamil. What we are concerned with is whether the appellants could understand Inspector Govindan's Tamil. From the account of each of the appellants in the cautioned statements in relation to the events and evidence adduced in court, the accused persons did not appear to have any difficulty in understanding him. No evidence was shown that when Inspector Govindan took the statements, any of the appellants told the Inspector, or anyone in authority after that, that they could not understand Inspector Govindan. It is common knowledge in Malaysia that there are persons of one racial origin by reason of their surroundings or upbringing who can understand and speak the colloquial language other than their own, that of the Indian languages, Tamil is more commonly spoken in Malaysia than Hindustani or Malayalam, and that most Indians of non-Tamil origin can speak Tamil. As to the manner of speaking the language, in a case as in the present, one need only speak colloquial and not academic, classical or professorial language.

It is also contended that the caution as given by Inspector Govindan departed from the text of section 113 of CPC and the statements recorded must be held to be inadmissible. The provision clearly says "words to the like effect" can be used. Here the main contention is that the word "investigation" instead of the word "trial" nullified the caution. I agree with the trial court, as has been conclusively shown, that the Tamil word "investigation" in the context can mean "trial". The appellants must have known that the police were only investigating into the accident and Inspector Govindan was not holding a trial.

As to the speed within which the Inspector took the six statements, it is the finding of the trial court that it was not impossible for the statements to be recorded within the time stated. The statements were read over to the appellants and they signed the statements as having been recorded within the time indicated in the statements.

I see no grounds for disturbing the findings of the trial court that Inspector Govindan was competent in Tamil, that the words he used in the caution statements have the same effect as required by the Criminal Procedure Code, and that the statements were recorded within the time stated in them. I agree that the cautioned statements are admissible in evidence.

The appellants' side also complains that the trial court adopted a different standard in terminology in dealing with evidence. At times the learned President used "I am of the opinion" instead of "I believe" or "I am satisfied". It is shown that he used the word "opinion" on two occasions (pp. 70 and 77 of the grounds of judgment). On one occasion the defence in dealing with the trial within trial alleged that Inspector Govindan had told the appellants everything would be all right and that they could go home. The Inspector denied having made this inducement. In dealing with the evidence, the learned President said "I am of the opinion that these statements were fabricated. I ruled that no inducement was made to the seven accused persons". On the second occasion, in dealing with the question whether Inspector Govindan omitted to use the words "It is my duty to warn you ...", the learned President said "Defence made great play of the missing phrase. But Inspector Govindan stated later after being directly asked that he had administered the full caution in Tamil to each of the accused. I am of the opinion that he most probably did". The English text of the cautioned statements contain the proper caution. It must therefore be taken that the proper caution had been administered.

I can see nothing wrong in the learned President using the word "opinion", in the circumstances shown, i.e. when court is expressing whether or not a situation is probable or improbable. The *Concise Oxford Dictionary* gives many meanings to the word. One is "view held as probable". In any case, the learned President, at p.79 of his grounds of judgment, said that he was satisfied that each of the seven appellants who made the statements had been administered the caution as required under section 113 of CPC and that the statements were given voluntarily without any inducement, threat or promise. Since the trial court

was so satisfied, and the arguments put forth have not shown that there was any serious error in administering the caution, I would not disturb the trial court's finding. In the context used by the learned President it is clear that he was forming a belief.

It is further contended that the learned President did not direct his mind as to how to deal with circumstantial evidence by using the formula that he must have found all the evidence inevitably pointed to the accused persons. For this contention counsel for the appellants relies on *Lim Foo Yong* v. *Public Prosecutor*[4] where Chang Min Tat, J. (as he then was) discussed several authorities at the end of his judgment. The headnote of that case reads:

"Held: in this case the learned President Sessions Court had not considered the whole evidence from all angles as she ought to have done and it was impossible to say whether had she not failed to do so she would nevertheless have been compelled to the one conclusion of the appellant's guilt and held that the circumstantial evidence must point irresistibly to the guilt of the accused".

In *Kartar Singh & Anor* v. *Rex*[5] the Court of Criminal Appeal of the time at Singapore, as indicated in the headnote, held:

"When there is a direct evidence, however slight, the Jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all."

I am well aware that the "irresistible" formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *McGreevy* v. *Director of Public Prosecutions*[6] where it was argued, at p.279, before the House of Lords that "in a criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused".

The argument seems to have been founded on *Reg.* v. *Onufrejczyk*,[7] a decision of the court of Criminal Appeal in England and referred to in *McGreevy's* case. Lord Goddard, C.J. in *Onufrejczyk's* case at p.394 said:

"Now it is perfectly clear that there is apparently no reported case in English law where a man has been convicted of murder when there has been no trace of the body at all. But it is equally clear that the fact of death, like any other fact, can be proved by circumstantial evidence, that is to say, evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that it must lead to one conclusion only. Oliver J. began and ended his summing up to the jury with the direction which he took from *Rex* v. *Horry*[8] before the New Zealand Court of Appeal, saying that it was as clear a direction as he could give. The headnote of that case, which he took as stating the law, is as follows: 'At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for'.

Speaking for myself I entirely agree with that as a statement of the law except that I would not have used the words 'morally certain'; I would prefer 'such circumstances as render the commission of the crime certain'.

"It is always a pity, when dealing with evidence, to use epithets either to increase or decrease its value; and when cases in the books use expressions such as 'a high degree of certainty' or 'strong evidence' and so on, they really add nothing to what the law requires. The law requires a case to be proved, and a jury is warned and told that its members have to be satisfied on the evidence that the crime is proved, that the prisoner is guilty of the crime; and they should be told that if when they have heard the evidence they are not satisfied, and do not feel sure that the crime has been committed or that the prisoner has committed the crime, their verdict should be 'not guilty'."

It will be noted that the observations relate to the fact of death of an unfound body of the dead person. Lord Morris of Borth-y-Gest in *McGreevy's*[6] case in reference to circumstantial evidence as to the guilt of an accused person made the following observations at pp.284-5:

"If, having regard to the facts and circumstances of a particular case, a summing up is held to have been inadequate and to have failed to set the jury on their proper line of approach or to give them proper guidance, a conviction might be held to be unsafe and unsatisfactory. But I am averse from laying down more rules binding on judges than are shown to be necessary.

In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that

a jury can readily understand and by clear exposition can readily be made to understand".

The present case was heard by the President without a jury as laid down in the Criminal Procedure Code. Speaking for myself, with respect, I am inclined to agree with the observations of the House of Lords that in dealing with a case which relies on circumstantial evidence it is sufficient if it makes a finding in considering all the evidence it is satisfied beyond reasonable doubt that the accused is guilty of the offence. In my view the expression that the evidence points only to the irresistible conclusion that the accused is guilty is all a play of words. Either finding has the same flavour, but of course the latter is more colourful. It should also be noted that one of the *Shorter Oxford English Dictionary* meanings of "satisfy" by itself is "to set free from doubt or uncertainty". It seems that when one is satisfied with a fact, the question of having any doubt or being uncertain should not arise.

In any case, at p.187 of the grounds of judgment in the present case, giving his finding on the fight which resulted in the deaths of the deceased persons, the learned President said:

"Any prudent man would have concluded that the persons who inflicted the injuries were expert fighters. Otherwise the injuries would be everywhere on the bodies of the deceased. The blows delivered were also clean blows and delivered with force at the point of contact. After considering everything, I came to the inescapable conclusion that the guards were expert fighters. Furthermore, the intruders managed to inflict three injuries to the guards and even these injuries might be self-inflicted and in return the guards cracked the heads of the four deceased with at least thirty blows.

"The car too received about thirty blows or more. With the weapons they had and the way they handled the weapons, the guards simply massacred the intruders with the weapons they had. Furthermore, the intruders wore their gowns and their kopiah and their sarban. These were not the dress of people who were prepared to fight. Some of them even wore slippers. You do not come to fight with slippers. My conclusion is that the guards simply slaughtered the intruders."

The phrase to note here as used by the learned President is "inescapable conclusion" which, in my view, is the same as "irresistible conclusion".

Then the learned President dealt with the part of evidence where the 8 appellants told ASP Jamaluddin (PW 2) that they took part in the fight and the evidence of Corporal Abdul Ghani (PW 3) that he found the 8 appellants in the temple compound immediately after the fight with 5 bodies still there, one dead, three dying and one (Zubir) badly injured in the car; weapons were all over the place. Five of the 8 appellants admitted using the weapons. Then he dealt with the argument that Malaindy, 2nd appellant, (now deceased) did not take part in the fight, although Malaindy admitted he was with the others when the intruders came into the compound of the temple. He also admitted with the others he took part in the fight and he was among the appellants when Corporal Abdul Ghani (PW 3) came to the scene.

The main factor to consider is that on the evidence, the court found the inescapable conclusion was that the appellant were expert fighters. Considering the number of persons dead, four, and one badly injured on the grounds of the temple and the weapons used by the appellants, the only conclusion that can be drawn is that all the appellants must have participated in the fight. I therefore consider that the finding of the learned President is according to the requirements of law, particularly when he came to the conclusion that the guards, i.e. all the appellants, were in the fight.

The defence story was that one Haji Othman, a neighbour, had volunteered to help. This was mentioned in a meeting at about 10.15 p.m. on 18.8.1978 when the guards came to the temple. Simbulingam, the priest, was the person who had been asked to fetch the Haji if his help was needed. There were many conflicts of evidence as to the role played by Haji Othman in the fight. Malaindy (2nd appellant) said that he saw Haji Othman carrying a knife. But the learned President found that it was impossible for Malaindy to have seen this from a distance of 44 feet, particularly when the knife was of the type usually found in a sheath.

Sappany (5th appellant) said that he saw Haji Othman standing with a sheathed knife. They told Haji Othman to go home as he was injured on the neck and left hand.

Veerappan (6th appellant) said in the cautioned statement that he did not see Haji Othman at any stage of the fight. On being questioned by his counsel he said he saw him. He also said the priest came with the Haji and then he went to his quarters leaving the Haji to go forward to try to intervene in the fight. Later he said, the Haji joined the fight and disappeared in the fight. When he saw the Haji he asked the Haji to go home.

Tangiah (8th appellant) said he helped the Haji after he was stabbed and he himself received

a cut on his left hand. After pulling the Haji away, he joined the fight. Then he received another injury on the eye. He saw the Haji at the place where the fight was going on. As he dragged the Haji away the Haji had with him a knife in his hand.

Subramaniam (4th appellant) in his cautioned statement said he did not see the Haji at any time during the fight. However, during the trial in examination in chief he said he saw the Haji who said "Don't fight, don't fight." He further said he saw the Haji, Jayaraman (1st appellant) and Arumugam (7th appellant) coming from where the fight had taken place.

Krishna (3rd appellant) gave detailed statements in his cautioned statement where he said the Haji left the scene towards his house. After the Haji was slashed, Tangiah (8th appellant) helped him. Krishna also said that the intruders attacked him with a parang which he apparently warded off with a changkol. Then, he said Haji Othman joined the fight slashing at a fallen figure on the ground. The conflict in evidence as found by the learned President here is that in the cautioned statement he said this was before the Haji went off. But in court he said it was when he came back and joined the fight.

As a general resume of the defence the learned President said that the defence made it out that the five intruders had rushed at the guards with parangs raised in their hands making movements to attack the main Sri Subramaniam temple. The appellants had their backs to the main temple defending it. The Haji came and a figure in white slashed at him and Tangiah (8th appellant) pulled him back. Then Jayaraman (1st appellant) and Arumugam (7th appellant) moved forward. The Haji joined them. One of the figures flashed a torchlight at him. Then he swung his weapon at him hitting the figure twice and following him. The Haji then slashed at him. Arumugam, the Haji and Jayaraman fought these intruders. According to Arumugam and Jayaraman, the Haji was very aggressive. He slashed at the figure which Jayaraman had struck down. The Haji also took over from him in dealing with the intruders who were opposing Arumugam, a big person. But Arumugam in his statement said that the Haji came to the scene five minutes after the fight had started. He was slashed and pulled back. He went to his house and did not come back. Jayaraman made no mention of the Haji returning. Krishna saw the Haji leaving the scene towards his house after slashing one of the intruders. He made no mention that the Haji returned (to the fight). Subramaniam made no mention of the Haji in his cautioned statement. Tangiah did not mention that the Haji went home. Sappany and Veerappan did not mention the Haji at all.

Considering the above evidence, the learned President drew the following conclusions: At the initial confrontation the intruders had only the iron pipe (P5), the hammer (P18) and the torchlight (P37) with them. When Zubir was struck at the Saneswaran temple he lost the iron rod. Amin and Nasaruddin went to help him. They had only the hammer and torchlight. Against these the guards had at least 5 weapons, (P10 shovel, P9 wooden pole, P4 bent iron pipe, P6 medium iron pipe, P7 long iron pipe and P1 parang). They had the element of surprise. The intruders were not prepared for a fight. They all ran to the car. The appellants had further weapons, P8 an iron rod and P3 a short parang. The intruders were overwhelmed. The fact that the attackers knew how to handle their weapons can be judged from the injuries sustained by the deceased persons and Zubir, the survivor. The Haji came during the attack and it was impossible for the intruders to slash at the Haji. The learned President agreed that Mohd. Amin (1st deceased) had the parang P2 with him and that when he advanced to attack he was merely giving his friends (the intruders) a chance to get away. If the Haji had been slashed with parang P2, his hand would have been chopped off. Anyway Mohd. Amin was overwhelmed. It was probable that Haji could have been slashed by one of the guards and it was impossible he would have come back after this. The learned President did not accept that the Haji could have come back to assist the guards.

For myself I find, as the learned President, that I cannot believe that the Haji had been involved in the fight at all, as he was 75 years old. On the evidence the only conclusion that can be drawn is that he was trying to stop the fight and in view of the number of persons involved in the fight he failed and was himself injured.

It has been argued that the learned President was wrong in rejecting the evidence of the doctor as to the weapons which caused the injuries. The learned President was not satisfied with the evidence of the doctor because he did not base his findings on clinical notes which he should have had with him at the trial and he was, therefore, unable to draw proper conclusions from his evidence. Since the learned President was the person

who saw the expert and heard his evidence, I do not think it would be proper for me to say that he should have accepted the medical evidence in toto without examining the evidence. From the notes of the evidence, I find the doctor was in a most difficult position when giving evidence. The examining in chief and cross-examining were so searching that it is understandable he could only give his answers in general terms. Apart from that most of the questions put to him were unnecessary hypothetical questions unrelated to the cause of the injuries.

It should be remembered that the deceased persons died of very severe injuries and from the evidence in this case the learned President was entitled to form his opinion as to the nature of the weapons which had been used to inflict the injuries. In the present case, as far as I can see, it does not take an expert to determine whether any of the injuries can or cannot cause the death or what weapon was used to cause the injuries. These are questions of fact. The trial court was as in a good position as the expert to determine the questions.

Of the appellants only Tangiah (8th appellant) and Arumugam (7th appellant) were injured. Argumugam had only one injury, a skin deep abrasion about 2" over the right tibia on the upper one third of the right leg. He was treated as an outpatient. According to Dr. P.V. Kumar who examined him, the injury could have been caused by a blunt instrument or a fall on a hard surface. Tangiah had two injuries: (1) a 2" laceration on the right eye bone, (2) a 2" clean cut laceration on the base of the left arm. He too was treated as an outpatient.

From the injuries suffered only by the 2 of the appellants, the only conclusion that can be drawn is that the deceased persons offered hardly any resistance when they were attacked; with the instruments they had and having been surrounded by the appellants, they were in no position to attack. The appellants had superior weapons and showed no mercy towards the deceased persons. Indeed, the fight was an one-sided affair. All the evidence pointed to the conclusion that they were all acting in concert and had the intention to kill from the outset. On the evidence, I cannot see how the defence of self defence could have been considered. No doubt the intruders in their action were committing an unlawful act. But the appellants were not justified in converting the situation into a trap for the purpose of causing deaths and unnecessary bodily harm to the intruders, without first resorting to lawful means by detaining them. As observed by the learned President when the appellants attacked, the intruders were about to flee from the place. If the appellants did not have the intention to kill, they would have made their presence known to the intruders when the car was backing into the compound of the temple or when they were at the Saneswaran temple. To say the least, the injuries were inflicted unnecessarily. In fact I would find that the appellants were in a good position to detain the intruders. They had superior weapons. They outnumbered the intruders and, as the learned President put it, they had the element of surprise over the intruders. If they had overpowered and detained the intruders, they would have rendered the best service to the temple and the community.

On the evidence, I agree with the finding of guilt against all the appellants by the learned President on all the charges. Even without the cautioned statements and the statements to ASP Jamaluddin (PW 2) and excluding the inadmissible statements to Corporal Abdul Ghani (PW 3), I would find the remaining evidence is sufficient for a finding of guilt against all the appellants. As I have said at the beginning I would not deal with the other numerous grounds of appeal which are mainly on finding of facts.

As to the cross-appeal against sentence, I agree that the sentences imposed by the learned President are on the lenient side. If I had heard the case, I would have imposed heavy sentences. But again the learned President had the advantage of hearing and considering the full circumstances of the case. In the special circumstances of this case, I would not disturb the sentences.

Appeal and cross-appeal dismissed.

Appeal and cross-appeal dismissed.

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